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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, SECRETARY OF DEFENSE, *et al.*,
*Petitioners,*

v.

ARLO TATUM, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF

**Unitarian Universalist Association**
**Council for Christian Social Action, United Church of Christ**
**American Friends Service Committee**
**National Council of Churches of Christ**

**Amici on behalf of the respondents**

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## INTEREST OF THE AMICI CURIAE

### Unitarian Universalist Association

The Unitarian Universalist Association is a religious association established more than 200 years ago and incorporated under the laws of New Hampshire and New York. The

Association, in its constitution, "is empowered to, and shall devote its resources to and exercise its corporate powers for, religious, educational and charitable purposes." In accordance with these purposes, the Association, among other things, seeks "to cherish and spread the universal truths taught by the great prophets and teachers of humanity . . .; to affirm, defend and promote the supreme worth of every human personality, the dignity of man, and the use of the democratic method in human relationships;" and "to implement our vision of one world by striving for a world community founded on ideals of brotherhood, justice and peace."

The Association, its member churches and fellowships have long regarded the Constitution and the Bill of Rights as a bulwark of religious and civil liberty. Individual members, churches, and congregations of the Association have long believed that social action on issues of public concern is an important part of their religious and personal obligations. As a result, many congregations and individual members have actively exercised their rights of free expression and assembly under the Constitution with respect to the controversial public issues of our times. It was a matter of grave concern, therefore, to the Association, its churches, and members to discover that at least four churches and an undetermined number of individual members have been the subject of military investigation and surveillance. Because of its belief that such surveillance is alien to our form of government and foreign to a society of free men and women, the General Assembly of the Association on June 11, 1971, unanimously resolved to oppose such surveillance and to support efforts to bring it to a halt.

**Council for Christian Social Action, United Church of Christ**

The Council for Christian Social Action is a national instrumentality established by the United Church of Christ to "study the content of the gospel in its bearing on man in society, provide and publish information and literature on social issues, cooperate with . . . . appropriate bodies in making the implications of the gospel effective in society, and

formulate and promote a program of social education and action for the United Church of Christ." The United Church of Christ is a major American Protestant denomination of some 2,000,000 members, the union of the Congregational Christian churches and the Evangelical and Reformed Church.

Although the Council speaks only for itself, addressing both churches and the civil society in the interests of justice and mercy, on occasion it represents the broader convictions of the communion as expressed through pronouncements of its General Synods. This is the case in the Council's long-term promotion of civil liberties in American society and its opposition to all forces which deny rights of privacy and of association, suppress political participation, stifle dissent, or punish critics of national policy.

Thus the Council can also speak for the Fourth General Synod of its church, which called upon churchmen "as Christians and citizens" to safeguard the right of freedom of expression as guaranteed in the First Amendment of the Constitution of the United States, including the right within constitutional limits to express opposition or commendation to our government or to advocate peaceful change to alternative political and economic systems without being intimidated or harassed.

More recently, this church's Eighth General Synod, meeting in 1971, as part of its concern to enable U.S. power to serve humane ends and contribute to world peace, took as one of its prime objectives "to have the Instrumentalities, churches and members work to restrain the power of the Pentagon in probing into the private lives of American citizens."

**American Friends Service Committee**

The American Friends Service Committee is an independent, voluntary, privately-owned Quaker organization, founded in 1917, and active since that time in works of humanitarian relief and service, reconciliation between nations and peoples, public education about peace, and programs to overcome discrimination and oppression occasioned

by race, poverty and injustice. It has devoted major energy to opposing war, militarism and conscription and to assisting people who have suffered from their consequences.

On February 28, 1970, the press reported that the American Friends Service Committee was the subject of Army military intelligence files and that there had been military surveillance of the AFSC and individuals associated with it. Subsequent press and other public disclosures alleged that the surveillance had been indiscriminately directed at civilians engaged in legitimate anti-war, anti-draft and pro-civil rights activities. These disclosures had a disruptive effect on the peace education work of the AFSC and are believed to have discouraged some Americans, otherwise ready to participate publicly in activities related to U.S. war and draft policies and practices, from risking such official military surveillance.

On May 11, 1970, the AFSC wrote to the Secretary of the Army requesting factual information about the press statement and the Army authority for maintaining such files. The reply stated that under Army policy, the Army has no interest in investigating the AFSC because the national activities and goals of the AFSC do not constitute a threat to the Army's operations, property or personnel. But the Army further stated that "certain members" of the AFSC at the local level were and can be "of investigative interest" to the Army, and that, aside from any such individual files on "local members," the Army did maintain a file on the AFSC containing information and material "generally derived from other agencies and sources." We were informed that the file on the AFSC was examined to determine whether it could be retained under current policy and, in the words of the General Counsel's letter, "It could not be retained and was, therefore, destroyed." No proof of such destruction has been offered and no information has ever been given as to which individuals associated with the AFSC had been under surveillance and the subject of past or present files.

The American Friends Service Committee believes that American citizens must be accorded protection against the

silent and *subrosa* dissipation of their rights of privacy and against the invalidation or subversion of their rights of assembly, press, speech and dissent by means of secret or even brazen surveillance, data storage and information dissemination by the military authorities. The American Friends Service Committee seeks protection for itself and the American citizens associated with it against such military dangers.

**National Council of Churches of Christ**

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions.

Several of those policies have affirmed the rights of all persons to freedom of religion, speech, press and assembly without fear of intimidation, retribution or obloquy. It is in implementation of those policies that the National Council of Churches participates in this brief. An additional consideration is the fact that one of the plaintiffs which has been subjected to military surveillance, Clergy and Laymen Concerned About Vietnam, originated in one of the program units of the National Council and has since become an independent organization. Many of the leaders of the National Council are or have been active as individuals in that organization, and while no less concerned for the like rights of all, feel a special kinship for it and a resentment against military surveillance of persons whom they know and trust.

Permission is granted by both parties for the filing of this brief.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are:

Article I, section 8, relating to the legislative power over the armed forces, and especially the congressional powers "To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions;"

Article IV, section 4, which provides that:

> "The United States . . . shall protect each [state] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence;"

The First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statutory provisions, 10 United States Code 331-333 are set forth in Appendix A, pages 43-44, of the petitioner's brief.

Section 334, of title 10, U.S.C. reads as follows:

> *Proclamation to disperse.*
>
> Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

Section 1385, of title 18, U.S.C. reads as follows:

> *Use of Army and Air Force as possee comitatus.*
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a possee comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

## QUESTION FOR REVIEW

The writ of certiorari presents the following question: Do individuals and organizations not affiliated with the armed services present a justiciable issue under the First, Fourth, Fifth and Ninth Amendments when they allege that their rights of free expression, privacy and association have been infringed by unauthorized, unnecessary and indiscriminate military investigation of their political activities and personal lives?

## STATEMENT[1]

Sometime in the 1960's, prompted by an increase in civil violence, the United States Government, acting through the armed forces and primarily the Army, began a massive program of investigation and surveillance[2] of the thoughts, habits, attitudes, political activities and associations of individual American citizens.[3] This Army program took the form of the development and maintenance of investigative files in manual and computerized systems. It was an expansion of

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[1]Because of the incomplete nature of the record before the Court, this statement is based in part on the investigations of the Constitutional Rights Subcommittee, United States Senate, from January, 1970, to present. The bulk of the Subcommittee's investigations has been printed. See Hearings on Federal Data Banks, Computers, and the Bill of Rights, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92d Congress, 1st session, 1971. Hereinafter cited as "Hearings." Copies of these hearings are submitted separately as an appendix to this brief. Additional information is contained in various classified and unclassified documents which have been segregated for possible discovery proceedings in this litigation.

[2]Although popularly termed "surveillance", the military program has consisted of far more than the passive observation and recording of public events that this term might suggest.

[3]Surveillance of this type by the armed forces has been conducted with varying degrees of intensity ever since World War I.

pre-existing investigative operations of the armed forces, such as personal background investigations, and was in many aspects inseparable from these other functions. The program was ostensibly developed in connection with the increased use of the Army to put down civil violence. Although there is little evidence available to support the contention, it has been explained as an effort to "predict" situations in which the use of military force would be required.

At the height of the program in the late 1960's, thousands of agents of the United States Army Intelligence Command were involved. In addition, numerous other investigative personnel and other sources of military manpower from the Continental Army Command, the Navy and the Air Force were employed. According to Army documents, the responsibility of these investigators was to gather information on persons and organizations engaged in various activities associated with racial problems, antiwar, antidraft, and other controversial public issues. Intelligence activities have been conducted in public places, on college campuses, at high schools, in churches, and at private meetings. Persons subjected to this program have ranged from leaders of active organizations, to ordinary members, the curious and the passerby. Individuals expressing support or sympathy with subjects of the surveillance have also come under investigation. Subjects have included numerous Congressmen and United States Senators and family members of a Senator, state and local officials, a member of this Court, newspaper reporters, clergymen, and thousands of other Americans. Although no total number can be estimated, it is not an exaggeration to talk in terms of hundreds of thousands of individuals, organizations, events, and dossiers.

The information gathered on these citizens has included their participation or presence at political events, their political views, their relationships with other political activities, their travel, their family associations, finances, education, and other types of personal data. Once a person becomes the subject of investigation, the data gathered about him and his

activities is unlimited.[4] Information for the Army dossiers has been obtained by observation of public activities, by covert infiltration, by electronic devices, tape-recorders, cameras, and by videotape, as well as by requesting data from other governmental agencies and from private sources. The Army analyzed and attempted to categorize and label individuals according to their utterances and the way they exercised their rights of free speech, assembly, association, and petition.

The bulk of investigative activity by the Army's own personnel occurred at the field level. Agents collected information and filed "spot reports," "agent reports", and "summaries of investigation". Most of this data was forwarded up the chain of command but record copies were kept in data centers at every level of command. Manual files were maintained at every level. At least four and possibly more computer systems were employed to store, analyze, and retrieve the information collected. Many files were microfilmed and integrated with other files on persons who were suspected of violations of security and espionage laws. These were located at the headquarters of the Intelligence Command (Fort Holabird), the Continental Army (Fort Monroe), the Third Army Corps (Fort Hood), and in the Pentagon. More than one computer data bank was maintained in some of these locations.

Information gathered in this program and political analyses produced as part of it were indiscriminately shared and exchanged by the Army and were distributed to other military record systems, and to other federal; state, and local agencies maintaining investigative files. Although subsequent to the filing of this lawsuit, many of the Army computer systems and other collections of data were ordered destroyed, much of the data still exists in files maintained by the Department of the Army, the Defense Department, and the other federal, state, and local agencies to which it was

[4] *Hearings*, p. 384. Statement of Assistant Secretary of Defense Froehlke.

regularly sent. The Department of the Army has been unwilling or unable to ensure the complete elimination of the information collected under this program from its own and other governmental records.[5]

Examples of the type of organizations put under investigation include the following: The Southern Christian Leadership Conference, the National Association for the Advancement of Colored People, the State Rights Party, the Presbyterian Interracial Council of Chicago, the American Civil Liberties Union, Clergy and Laymen Concerned About Vietnam, the Congress of Racial Equality, the Mexican-American Youth Organization, National Organization for Women, Operation Breadbasket, United Christian Community Service, the Urban League, Young Americans for Freedom, SANE, Milwaukee United School Integration Committee, American Friends Service Committee and hundreds of others.[6]

This action was brought by a group of citizens and organizations challenging the constitutionality under the First, Fourth, Fifth and Ninth Amendments of intelligence activities conducted against them by the Department of Defense. They allege that military investigation of peaceful and lawful political activity by persons unconnected with the armed forces has infringed upon their ability to exercise constitutionally protected rights, and that it infringes the rights of others. They seek a declaratory judgment that such military activity is unconstitutional or otherwise illegal, injunctions

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[5]Letter from J. Fred Buzhardt, General Counsel, DOD, to Senator Sam J. Ervin, Jr., Chairman, Constitutional Rights Subcommittee, June 10, 1971. *Hearings*, pp. 1232, 1233, 1235.

[6]See "The Phoenix," Boston, Mass., October 27, 1971; and Dispatch News Service International release no. 218 for a more comprehensive list of organizations. These news stories are based on an army collection plan dated April 23, 1969. *Hearings*, pp. 1731-34. See also *Hearings*, pp. 184, 264-66 for examples of other individuals and organizations.

forbidding such activity in the future, and mandatory relief requiring the destruction of all information which resulted from the military program. The District Court dismissed the complaint on the government's motion without permitting a hearing on the request for a preliminary injunction. The Court of Appeals reversed and ordered further proceedings. This Court granted the government's application for a writ of certiorari over plaintiff's opposition.

The facts necessary to an informed consideration of the issues raised in the petition for certiorari do not sufficiently appear in the materials presented by the parties in their joint appendix. That information consists of what little was known of Army surveillance as of April, 1970. Subsequent to that date and continuing to the present, additional information has been uncovered on the nature of the military program, its origins, purpose, authority, scope, and actual implementation, and its effect on constitutional rights. Consideration of this additional information is necessary to a proper determination of the questions now before the Court. For that reason, copies of the hearings conducted by the Constitutional Rights Subcommittee, United States Senate Committee on the Judiciary, have been submitted as as an appendix to this brief.

## SUMMARY OF ARGUMENT

Plaintiffs present a justifiable issue by alleging that their rights to free expression, association and privacy have been infringed by an unauthorized, unnecessary, and indiscriminate military program of investigation into their political views, activities, associations and personal lives. The injuries they suffer to their First Amendment rights consist of a legally perceivable inhibition on the desire or ability to exercise the rights of free expression, an invasion of their right to associational privacy, and an infringement of other areas of protected activity under the First Amendment. Under our Constitution, citizens do not have to pay the price of these consequences in order to voice opinions or

to associate with groups which are unpopular with the government. Not only has military surveillance directly caused these injuries, but it has contributed to or facilitated inhibitions on free expression by joining with and fostering other social and personal forces which supply coercive or deterrent effect to the government's action. Despite such identified harm to First Amendment rights, the government lacks a compelling interest for conducting the military program. The other strict requirements which must be met to save the activity from constitutional infirmity—proper legal authority, careful standards and strict administrative control, and precise implementation—are also absent. In such a context, it is insufficient to argue, as the government does, that plaintiffs are free to exercise their rights despite surveillance and that injury to First Amendment rights must be shown by empirical proof that the surveillance actually prevented plaintiffs or others from exercising their rights.

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interferences. *Bates v. Little Rock* 361 U.S. 516, 523 (1960).

## ARGUMENT

### PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF JUSTICIABILITY BY ALLEGING AN UNAUTHORIZED, UNNECESSARY, AND INDISCRIMINATE PROGRAM OF MILITARY SURVEILLANCE WHICH HAS INFRINGED UPON THE PEACEFUL EXERCISE OF THEIR FIRST AMENDMENT RIGHTS TO FREE EXPRESSION AND ASSOCIATION

#### A. Military Surveillance Infringes on First Amendment Rights

Although the issues immediately before the Court involve technical questions of justiciability, these questions arise in a First Amendment case and must be considered in that special context. The challenge by the plaintiffs (respondents here) is to the Army's system of political surveillance of citizens unassociated with the armed forces, who are merely exercising in a peaceful manner their constitutionally guar-

anteed rights to free expression. The plaintiffs seek to vindicate those First Amendment rights.

The Founding Fathers rightly believed that truth alone makes men free, and they desired most of all that the people of America be politically, intellectually and spiritually free. That is the supreme purpose of the First Amendment. It guarantees to every person in our land the freedom to think as he pleases; the freedom to convey information and ideas by speech and other means of communication; the freedom to associate with others to accomplish any lawful purpose; the freedom to meet peacefully for consultation and protest; the right to petition those in power for redress of grievances, either real or imagined; and the freedom to entertain such religious beliefs as comport with his own conscience. As Justice Brandeis, in *Whitney v. Calif.*, 274 U.S. 357, 375-76, (1927), eloquently put it:

> Those who won our independence believed. . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional

tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

These freedoms are impartial and inclusive. They apply to all persons, whether they are wise or foolish, learned or ignorant, profound or shallow, brave or timid, and regardless of whether they love our country or hate it and its institutions. There can be no doubt that these freedoms are often grossly abused and that society is, consequently, often tempted to demand or countenance their curtailment by government.

Essential though the freedoms are, they are not easily exercised in a climate of fear, discord, and dissension, especially when the ideas being expressed are those which are displeasing to government and unsettling to the majority of citizens. The critical views expressed by plaintiffs and others on racial issues, military policy, the war in Vietnam, and the state of our society and the policies of our government are indeed displeasing to those in power and perhaps to most of society. They are voiced in a time of fear and doubt, when other nations threaten the peace of the world and our nation's security, when crime and violence stalk our land, when riotous mobs have burned our cities, and when disquieting demonstrators have staged violent, unlawful demonstrations on streets and campuses. These ideas and the recent discord associated with them have frightened many Americans, including those in high office.

It is at such a time that the First Amendment is most necessary, most in danger, and most difficult to exercise. It is most necessary because it serves at least two purposes: if the complaint being voiced is justified, it will lead to action to ameliorate that complaint; if it is not justified, free speech nonetheless serves as a safety valve for pressures which otherwise might lead to violence. Free expression is most in danger in times of fear because it is then that demands for suppression of unpopular ideas are strongest. And free speech is then most difficult to exercise, because it takes

a brave man to voice unpopular ideas and face the anger of his neighbor and his government. The First Amendment, however, was made for the timid as well as the brave. While government cannot instill courage in the meek, it may not take advantage of a climate of fear to undertake a program which has the effect of restricting the First Amendment only to the very courageous. Government action, such as military surveillance, seemingly innocuous in the abstract, has the very real effect of suppressing the exercise of the First Amendment. The coercive power of this government action lies in the national climate of fear and doubt, and in the very real, tangible apprehension of some unknown form of retribution by government on those whom it fears and therefore watches. That such apprehension exists in America today is manifest.[7]

1. *Deterrence of free expression:*

There can be no doubt surveillance by the military has an inhibiting effect on the exercise of freedom of expression. The spectre of thousands of military agents dutifully observing, noting, and reporting to higher authority information about peaceful citizens expressing views distasteful to government, the gathering of information about the personal lives of these citizens, the collection of similar data held by local, state, and other federal agencies, the placing of this information in computers, and its interchange with other governmental agencies at all levels, have created an atmosphere of official repression. The type of political activity subjected to this surveillance is what is currently termed "dissent." The views which have attracted the Army's attention consist in large part of those which are antagonistic to the Army's policies, its interests, and its own political attitudes. Quite clearly, the Army has put under surveillance its political opponents. The surveillance, however, is even broader than

[7]For examples of the widespread concern over government surveillance and repression, see the collection of letters, news articles, and editorials in *Hearings*, Part II.

this. For included in the surveillance are racial matters, community affairs, labor unions, churches, colleges, the press, political figures, and thousands of common, ordinary citizens opposed to existing governmental policies. Army surveillance has had as its target almost the entire range of political attitudes which differ from "accepted," "mainstream" opinion.

The fact that the government, through the instrumentality of the Army, has seen fit to investigate the views and personal lives of those who disagree with it cannot help but clothe those views and the people who hold them with the taint of official disapproval and suspicion, and encourage the the public to regard them as somehow disloyal. This Court has always been suspicious of attempts by government to label or characterize political views as "approved" or "disapproved."[8] The reason is obvious. Government, by force of example, has considerable power to encourage or discourage the expression of ideas. The vice of military surveillance is that it serves to discourage the expression of controversial views and to impede their acceptance by others.

The impact of widespread governmental investigations of those who hold unpopular views is even greater, because military surveillance, even if it has served no real purpose, is generally thought to have a purpose.

> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

[8]The Army's attitude towards these views is well illustrated in the February 1, 1968, Annex B (Intelligence) to the DA Civil Disturbance Plan, in which those active in civil rights and antiwar movements are listed as "dissident elements" and only the Army is listed as the "friendly force." *Hearings*, p. 1121.

Surveillance creates an apprehension that some harm, its exact nature unknown, will befall those under surveillance, and those who associate with them.[9]

> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. . . . The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. *Talley v. California*, 362 U.S. 60, 65 (1960).

The coercive power of the unknown is very great, and may be more of a deterrent than the threat of some specific sanction. This quite tangible fear is not eliminated by statements from those in authority that they intend no ill to those whom they are investigating.

The social ostracism which meets those who express distasteful views to popular opinion makes it an act of personal courage in many cases to oppose the sentiments of the community. Military surveillance in this context can only make the individual's ability and desire to speak out more difficult. Not only must he face the disapproval of his fellows, but he must also incur the price of a loss of his privacy, the recording of his actions in the recesses of the files and computers of the armed forces, and the fear of some future detrimental use of those records by the Army or the other governmental bodies to whom the information is distributed. *Talley v. California*, 362 U.S. 60 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). Since the Army program is ostensibly conducting surveillance of "unlawful" civil disturbance, the citizen whose peaceful, lawful activities are put under surveillance has to bear the added burden, and the added fear, of being arbitrarily designated as one who aids, abets, encourages, supports, or even engages in unlaw-

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[9]See testimony of Ralph Stein, *Hearings*, pp. 244, 257.

ful acts of violence.[10] The harm is well illustrated by the reaction of citizens who support military surveillance: "The military wouldn't be investigating them if they weren't doing something wrong." The military, by conducting surveillance, fosters this public attitude, and thereby inhibits free expression in violation of the First Amendment.

It is no reply to say that empirical proof of this injury has not been demonstrated. The effect of the military program is to increase or encourage silence. How does one measure silence? It would be paradoxical, and obviously impossible, to require the production of witnesses to confess publicly that they have been frightened out of expressing their true feelings because of military surveillance.[11] That would result in the nullification of the proof at the very moment of its assertion. *NAACP v. Alabama* 357 U.S. 449, 459 (1958). It is enough that the government's actions can be "perceived to have the consequence of unduly curtailing the liberty of freedom of [speech] . . ." 357 U.S. at 461.

The First Amendment's protection for freedom of speech, of association, and the right to petition government for redress of grievances is not limited to governmental action which operates directly on those rights and whose avowed purpose is to limit or regulate them.

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Bates v. Little Rock* 361 U.S. 516, 523 (1960).

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[10]The Army made no distinction in its investigations or in its dossier systems between those who engaged in perfectly legitimate activity, those who had been convicted of violating criminal laws or even those who were convicted espionage agents. All were lumped together. It routinely used undefined characterizations such as "militant," "radical," "communist," "right-wing" and the like, to describe these people. See testimony of Ralph Stein, *Hearings*, pp. 244, 248.

[11]*Cf.* Testimony of Pete Parra, *Hearings*, p. 355.

The reason for so extending the protection of the First Amendment to prohibit "subtle governmental interference" is that freedom of expression needs "breathing space to survive" *NAACP v. Button* 371 U.S. 415, 433 (1963). Therefore, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama* 357 U.S. 449, 460-61 (1958). In recent years challenges to government action impinging on the free exercise of the First Amendment have involved a wide range of situations. The Court has limited the requirement of oaths, (*Baggett v. Bullitt* 377 U.S. 360 (1964)); restricted the operation of laws designed to protect the national security, (*U.S. v. Robel* 389 U.S. 258 (1967)); struck down controls on obscenity, (*Smith v. Calif.* 361 U.S. 147 (1959)); limited libel laws, (*New York Times v. Sullivan* 376 U.S. 254 (1964)) and restricted the congressional power of investigation. (*Watkins v. U.S.* 354 U.S. 178 (1957)). These cases have involved otherwise legitimate governmental interests, but because government had trenched upon protected areas in the course of pursuing its interests, its action was impermissible under the First Amendment.

> The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, . . . to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. . . . In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. . . .
>
> The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *NAACP v. Ala.* 357 U.S. 449, 461 (1958).

The deterrent effect may be caused by fear of possible loss of employment[12] or of a security clearance, by the threat of a government sanction, by the imposition of a tax, or by some other loss of a government benefit or threat of a legal sanction. But government action may be unconstitutional if it serves as the occasion, although not the direct source of this deterrence.

> Petitioner has made an uncontroverted showing that that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. . . .
>
> It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold. *NAACP v. Ala.* 357 U.S. 449, 462-63 (1958). See also *Bates v. Little Rock* 361 U.S. 516, 523-524 (1960).

The deterrent effect need not, however, stem from forces external to the citizen. It may be self-generated. In *Lamont v. Postmaster General* 381 U.S. 301 (1965), the minor inconvenience of filing a card requesting delivery of foreign propaganda was not a great imposition on an addressee's time. Yet it was ruled unconstitutional because some citizens in sensitive positions "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason." The ordinary citizen, moreover, "is likely to feel some inhibition in sending for literature which

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[12] On occasion Army surveillance has resulted in loss of employment. *Hearings*, pp. 1451-1457.

federal officials have condemned as 'communist political propaganda.'" 381 U.S. at 307. The earlier practice of maintaining lists of such addressees had been discontinued by the time the case reached the Court. Quite clearly, that practice, also involved in military surveillance, would have occasioned even stronger judicial condemnation.

The Communist registration cases underline this conclusion. Here the deterrent effect is caused by the public antipathy towards organizations of this nature and the effect of explicit governmental disapproval of these organizations, both of which factors operate to discourage citizens from engaging in free expression of views which are encompassed or might be encompassed by the registration laws. Government action which inspires or even facilitates self-censorship is deterrence enough, *Smith v. California* 361 U.S. 147 (1959). *Time Inc. v. Hill* 385 U.S. 374 (1967).

The oath cases provide additional examples in which the deterrent effect is not dependent on government applied sanctions alone. Oaths may not have the morally binding force they once had in a more God-fearing age. Yet some who sign disclaimer oaths will endeavor to abide by them, not only because of a speculative fear of future sanctions for violating the oath, but also because of a conscientious desire to avoid conduct and ideas they have sworn to forbear. *Baggett v. Bullitt* 377 U.S. 360 (1964). Furthermore, the oaths also serve as warnings to members of the general public to avoid views and associations on the possibility that some day they may have to ascribe to the oath. The deterrent effect applies not only to those who must take the oath, but to those who may never have to take it.

The lengths the Court has gone to in identifying such deterrence are well-illustrated by the "abstention" cases. They are not directly relevant here because the plaintiffs do not seek an exceptional interference with the normal requirements of federalism but only the exercise of the Court's responsibility to review the constitutionality of federal action. *Marbury v. Madison* 1 Cranch 137 (1803). Yet, the

abstention cases show that even delay caused by litigation amounts to a legally cognizable deterrent.

> [T]o force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect. *Zwickler v. Koota* 389 U.S. 241, 252 (1967).

The line of cases dealing with indirect infringements on First Amendment rights demonstrates that it is the injury to First Amendment interests which is important, and not merely the method by which it is accomplished. To view these cases as prohibiting only certain types of government action which have deleterious effects on the First Amendment is to give them a narrow and artificial construction, and to reflect a strained and grudging appreciation of the vital interest in preserving free expression. It would champion form over substance and put a premium on ingenuity when government seeks to silence those of whom it disapproves. In First Amendment cases especially, government may not restrain speech by indirection any more than by a frontal assault. Any lesser rule would demean the First Amendment and give solace to the ear but deny it to the heart.

2. *Interference with freedom of association:*

The Court has explicitly recognized that effective advocacy may require associational privacy, especially when the ideas advanced are controversial.

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn. v. Douds, supra,* at 402:

> A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. *NAACP v. Alabama* 357 U.S. 449, 462 (1958).

Anonymity is necessary not only when groups meet in private, but also when they demonstrate on the public streets. There is a very real difference between a public event in which the individual participants are essentially anonymous and the official recording of that act in order to identify the individual permanently with that event. The privacy of a citizen who is one of a faceless crowd at a demonstration or speech is totally destroyed when the Army observes and identifies the citizen, seeks out other data held by private and governmental agencies, infiltrates secret meetings,[13] permanently records this data, and makes it generally available to other governmental agencies. The harm done to the citizen—loss of his associational privacy—is even greater than when government merely compels self-disclosure of organizational memberships. Unlike other situations (*Bates v. Little Rock* 361 U.S. 516 (1960), *NAACP v. Button* 371 U.S. 415 (1963), and *NAACP v. Alabama* 357 U.S. 449 (1958)), in which government sought to further other, admittedly legitimate purposes and only incidently infringed upon associational anonymity, military surveillance is an intentional and not an incidental invasion of associational privacy. There can be no question that plaintiffs can point to an injury done to their First Amendment rights, because the action they complain of was designed to dispel the anonymity so necessary for political dissent. *Zwickler*

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[13]The Army also engaged in covert operations. *E.g.*, statement of Assistant Secretary of Defense Froehlke, *Hearings*, p. 422.

*v. Kodta* 389 U.S. 241 (1967), *Talley v. California* 362 U.S. 60 (1960). That privacy is especially necessary when one is opposing antagonistic governmental forces.

3. *Infringement of Freedom of Religion:*

The Army's indiscriminate intrusion into domestic civilian affairs has also had the effect of interfering with a number of other constitutionally protected activities. Its surveillance of the activities of elected representatives at the federal, state, and local levels, of unions, of the press and of the judiciary and the legal process, for example, are also infringements of the special constitutional rights of citizens engaged in these protected areas. It is of particular concern to your amici that a large portion of this program has also been directed at members of the religious community, and at religious activities. The record is replete with examples of this special invasion into religious aspects of our society. We agree with plaintiffs that the Army's program is an unconstitutional infringement of every citizen's freedom of expression, but we are especially disturbed by the fact that the program was also oblivious to the religious freedoms secured by the First Amendment. The Constitution erects a high wall separating the military from intrusion into domestic life. In ignoring this principle, the Army also breached the wall of separation between the state and the religious activities of Americans. When it included in its program the peaceful and lawful religious activities of Americans, the Army also violated the free exercise clause of the First Amendment[14]

**B. There Is No Compelling Governmental Interest in Military Surveillance**

Not all action by government which has an effect of deterring the free exercise of First Amendment rights is necessarily unconstitutional, but once such an effect can be

[14]See, *e.g.*, testimony of John A. Sullivan, *Hearings*, p. 351 and Oliver A. Peirce, *Hearings*, p. 305.

identified, the action is constitutionally defective unless the government satisfies strictly imposed limitations. As was succinctly stated by then Assistant Attorney General William Rehnquist, "While there is obviously no justification for surveillance of any kind that does not relate to a legitimate investigative purpose, the vice is not surveillance per se, but surveillance of activities which are none of the Government's business."[15]

The government must have a "compelling" interest in taking the action, it must be properly authorized, the rules must be precisely defined, and the action must be closely supervised and carefully conducted.

> In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. *Lamont v. Postmaster General* 381 U.S. 301, 310, Brennan, J., concurring.
>
> Broad prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. *NAACP v. Button,* 371 U.S. 415, 438 (1962).

(See *U.S. v. Robel,* 389 U.S. 258, 269 (1967), Brennan, J. concurring, for a discussion of the constitutional defects of inadequate standards in statutes touching on the First Amendment).

The fact that the program of political investigation being challenged has been conducted by the military serves both to underscore the seriousness of its deterrent impact on the First Amendment,[16] and also to identify its defective aspects.

As Chief Justice Warren has said:

> Determining the proper role to be assigned to the military in a democratic society has been a trouble-

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[15] *Hearings,* p. 601.

[16] See also *Tatum v. Laird,* 444 F.2d 947, 958 (1971), Wilkey, J.

some problem for every nation that has aspired to a free political life. The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.

The critical importance of achieving a proper accommodation is apparent when one considers the corrosive effect upon liberty of exaggerated military power. In the last analysis, it is the military – or at least a militant organization of power – that dominates life in totalitarian countries regardless of their nominal political arrangements. This is true, moreover, not only with respect to Iron Curtain countries, but also with respect to many countries that have all the formal trappings of constitutional democracy. Warren, *The Bill of Rights and the Military* 37 N.Y.U.L. Rev. 181, 182 (1962).

1. *Military surveillance is unauthorized by law.*

Recognizing this danger, the Founding Fathers took pains to subject the nation's military forces to strict controls.[17]

[17]The necessity of limiting the military's involvement in domestic affairs and of keeping it under strict civilian control has been recognized throughout history. For example:

(a) *The Revolutionary Period:* The king "Kept among us, in times of peace, Standing Armies, without the Consent of our legislatures" and "He has affected to render the Military independent of and superior to the Civil power." *Declaration of Independence;*

(b) *The Constitutional Convention:* "It was further observed that, when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army for that purpose, and leaves the militia in a situation as contemptible as possible, lest they might oppose its arbitrary designs; that, in this system, we give the general government every provision it could wish for, and even invite

In six separate clauses of Article I, Section 8, they carefully spelled out that Congress was to have legislative authority

it to subvert the liberties of the States and their citizens; since we give it the right to increase and keep up a standing army as numerous as it would wish, and by placing the militia totally unorganized, undisciplined, and even to disarm them; while the citizens so far from complaining of this neglect, might even esteem it a favor in the general government, as thereby they would be freed from the burden of military duties, and left to their own private occupations or pleasures. Luther Martin, Address to the Maryland legislature, November 29, 1787, in 3 Farrand, *Records of the Federal Convention* 209 (1939 Revised Edition, 1966);

(c) *The Federalist Era:* During the whiskey rebellion "Hamilton had hoped to capture a sufficient number of proper persons for examples, but of the 150 men brought in by the army few could qualify for this distinction. In obedience to Washington's orders; the army remained in strict subordination to the civil authorities. Suspects were not haled before a military tribunal and no man was condemned without due process of law. *Nevertheless,* Hamilton sent out scouting parties to round up suspects, who, in some cases, were brought before him for preliminary examination. While he did not succeed in ferreting out many traitors by these methods, his inquistorial activities later provided his political enemies with a rich vein of propaganda." Miller, *Alexander Hamilton and the Growth of the New Nation,* 409 (1969 ed.);

(d) *The Civil War:* "If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them, can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules."

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the Kind of Great Britain was deemed by our fathers such as offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil Liberty and this martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish." Davis, J., *Ex Parte Milligan,* 71 U.S. (4 Wall) 2, 124-5, (1866);

over the military, yet at the same time they were also careful to guard against legislative tyranny or excessive discretion.

Thus, the Constitution restricts military appropriations to two years, divides jurisdiction over the militia between the central and state governments, and limits the domestic use of the military to repelling invasions, suppressing insur-

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(e) *Reconstruction:* Arguing the necessity of the *possee comitatus* act, Senator Merrimon of North Carolina stated:

"Now sir, we know by sad experience that the Army has been sued not once, but time and time again, in a way that not a court in this country would sanction. The Army has not only been used in the collection of the internal revenue in a way not authorized by law, but it has been used and prostituted to control elections repeatedly. Statehouses have been seized over and over again, and not a great while in the past. The objection of this section is to prevent a like prostitution of the army in the future. I maintain that it is right and proper that we should insist upon it. Let us examine it candidly and see that it is right, and if not make it so; . . . I trust sir, that the President will not improperly employ the Army in the future; but I trusted on former occasions that the President would not do so, but we saw that he did do it, not once, but oftentimes, and where a supposed or pretended emergency may arise he may do so again. Nobody can tell. I cannot and I am not willing to risk any President with such power, even if Congress has the right to confer it."

7 *Congressional Record*, Part 5, 4245 45th Cong., 2d sess. (June 7, 1878) (remarks of Senator Merrimon);

(f) *The Korean War:* "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." Black, J., *Youngstown Sheet and Tube Co., v. Sawyer*, 343 U.S. 579, 587 (1952).

rection, and executing the laws. Command of the Army was given to the nation's chief civilian officer, the President, and his limited authority for domestic use of the military was repeated in art. IV, §4 – repelling invasion and suppressing domestic violence – together with the exact procedure required to be followed in such cases.

The Constitution, therefore, is extremely explicit in limiting the domestic role of the armed forces. Congress, pursuant to art. I, § 8 and art. IV, § 4, has enacted 10 USC 331-334 which are the sole statutory grants authorizing intervention by the armed forces into American domestic life. Yet, it is clear that these statutues nowhere by their terms specifically authorize[18] or even contemplate surveillance by the military. The statutes govern only the circumstances in which the President may use military force. Unless these conditions are present, the President may not loose the Army on the American people, and any direction by him purporting to do so is without statutory or constitutional support. Even when the necessary preconditions for use of the armed forces under these statutes exist, these statutes also prescribe the procedure that must be employed before the President may call out the Army. Unfortunately, recent American history has provided us with examples where this has been deemed necessary.[19] But the actual use of military force to suppress violence, pursuant to art. IV, § 4 and these statutes, is not challenged here; nor is the power of the Army to perform necessary investigation when actually committed pursuant to these statutes; nor even its right to receive intelligence when such a commitment is about to be made. What is challenged is a program of

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[18]See, *e.g.*, statement of Defense Dept. General Counsel Buzhardt: "As I have said, Senator, there is no act that we know of that deals with the subject one way or the other, in specific terms." *Hearings*, p. 416.

[19]See "U.S. Army Intelligence Role in Civil Disturbances" (undated). *Hearings*, p. 1291.

political surveillance and investigation of persons throughout the entire country, and encompassing almost every form of peaceful political activity, with no relationship to actual situations requiring the use of military force.

The authority to conduct political and personal investigations of such a general nature cannot be read into these statutes. First, the Constitution and American history demonstrates that grants of power to the military to act in domestic affairs must be narrowly construed.

> On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by the Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom. Warren, *supra* at 197

Second, Congress has expressed itself in the past against a broad view of any military involvement in domestic affairs. The *posse comitatus* act, 18 U.S.C. 1385, prohibits the use of military forces to aid in the enforcement of law by civilian authorities as a "posse comitatus *or otherwise*" unless "*expressly authorized* by the Constitution or Act of Congress."[20] (Emphasis added).

> The statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats

[20] 18 USC 592 and 593, prohibiting the use of troops in elections, are other examples of Congress' efforts to protect domestic political life from the inimical influence of military involvement.

> who sponsored it, as expressing "the inherited antipathy of the American to the use of troops for civil purposes." (Sparks, National Development 1877-1885, p. 127, in Vol. 23, The American Nation, A History) Its relevancy to this age is sadly clear (1957, 41 Op. A.G. No. 67). . . . [It is] a statute that is absolute in its command and, explicit in its exceptions. *Wrynn v. U.S.* 200 F. Supp. 457, 465 (1961), Dooling, J.

It is clear that the entire operation of military surveillance is a violation of the federal criminal laws. But even in the absence of these legal and constitutional principles which restrict the military's authority in domestic activities, the Court must apply the principle "that statutory words are to be read narrowly so as to avoid questions concerning the 'associational freedom' that *Shelton v. Tucker* protected and concerning other rights within the purview of the First Amendment." *Schneider v. Smith* 390 U.S. 17, 27 (1968). If, ordinarily, deference will be given to the President and, and the Congress in matters of military affairs outside the borders of our country or in times of war, this broad latitude cannot apply when the military power is involved in domestic affairs, *Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952), and certainly not when constitutional rights are at stake.

> The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court. However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934). *U.S. v. Robel* 389 U.S. 258, 263-64 (1967).

2. *Military surveillance serves no military purpose.*

If, despite these principles, an implied authority to conduct surveillance can be read into these statutes,[21] such surveillance still does not avoid challenge unless it is necessary to the effective performance of the Army's statutory function.

> . . . [G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. *Bates v. Little Rock* 361 U.S. 516, 525 (1960)

Because of the unusual posture of this case, the formal record is devoid of much evidence which illuminates the contentions of plaintiffs that the program has been overbroad in concept, that it has not been controlled in operation, and that it has provided the military with no assistance of any value to the efficient performance of statutory duties. A consideration of the other information available to the Court demonstrates that the argument of military necessity does not withstand the evidence.

The function of the armed forces in civil disturbance is simply to assist the civilian authorities in suppressing violence. In the absence of a declaration of martial law, the Army performs no civil, governmental functions of its own.

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[21] There is also the question of whether such authority to conduct political surveillance has been properly delegated to the Army. The "Delimitations Agreement" of 1940, as amended, assigns this responsibility to the Justice Department. *Hearings*, p. 1172. The record is devoid of any Executive Order or other written order by the President expressly transferring to the Department of Defense the authority to conduct domestic intelligence operations of the type involved in this litigation.

In civil disturbances, the Army acts as an arm of the civilian authorities, but it is not a law enforcement body. It is only an instrument of power whose limited function is to suppress violence. The information the Army actually needs to prepare for civil disturbance is limited to that logistical information necessary to move troops, quarter them, and deploy them. The Army needs no advance political information, no information on personalities, views, opinions, personal data, and the like.

> The First Amendment's ban against Congress "abridging" freedom of speech, the right peaceably to assemble and to petition, and the "associational freedom" (*Shelton v. Tucker, supra*, at 490) that goes with those rights create a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "the opinions of men are not the object of civil government, nor under its jurisdiction. . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . ." *Schneider v. Smith*, 390 U.S. 17, 25 (1968)

The assessment of the need for troops to suppress civil violence is one to be made by the civilian officials, state and federal, whose constitutional and statutory responsibility it is to decide to employ troops. This Court need not assume the functions of a military commander or the President to recognize the limited nature of the information the military needs to perform its limited responsibilities in this area.

3. *Military surveillance is overbroad in direction and indiscriminate in its operation.*

The various senior officials responsible for Army surveillance have repeatedly expressed the view that the military surveillance has not been necessary or helpful.[22] Their judg-

[22] " 'They [the pictures and reports] were the most worthless damn things I have ever seen in my life. It was a waste of paper. We said "Burn 'em," ' Jordan said. 'Even if we didn't have any concerns about civil liberties, which we do, we would have said it was worthless and to

ments confirm the conclusion ordinary common sense dictates. Whatever value this political and personal information might have to civilian authorities, the political views of peaceful critics, much less personal facts about their private lives, can be of no use to the commander deploying his troops to put down violence, nor to the soldier on the street.

The statements of these officials also confirm plaintiff's allegations that the program has permitted an unnecessarily broad scope of discretion to those who implemented the surveillance program,[23] and that it has been implemented in a totally indiscriminate manner.[24] The broad, ill-defined nature of the program is demonstrated graphically by the documents which have so far come to light. The successive Intelligence Collection Plans of 1968 and 1969, the Intelligence Annexes, and similar documents disclose that the Army agents have been told to conduct surveillance on those who practice violence, those who advocate it, those who hold political views similar to those of persons who are sympathetic to violent tactics, and anyone remotely associated or sympathetic to them.[25] No activity protected by the First Amendment has been immune. Peaceful assemblages,

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do away with it,' Jordan said." Interview with Robert E. Jordan, General Counsel, Dept. of the Army, in "Army Explains Civil Snooping," Washington, D.C. *Star*, Dec. 6, 1970, *Hearings*, pp. 1728, 1729. See also letters from Jordan to Ervin, Feb. 25, 1970 and Nov. 27, 1970, *Hearings*, pp. 1048, 1049; 1106, 1107.

[23]Since early 1970, the rules and regulations governing Army surveillance have been repeatedly defined and redefined by the Department of the Army and by the Secretary of Defense.

[24]*E.g.*, *Hearings*, p. 421: "As I indicated in my statement this morning, Mr. Chairman, both the collection plans of February 1, and May 2, could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was civil disturbance. Both plans were very broad." Statement of Assistant Secretary of Defense Froehlke.

[25]See the various Intelligence Collection Plans, *Hearings*, pp. 1119, 1123, 1154.

speeches, marches, the filing of lawsuits, and any other kind of public activity connected with politics have been fit subjects for military surveillance. Once an individual has become the subject of surveillance, almost no information about him is irrelevant. The Collection Plans permitted and indeed required the collection of almost all information possible.[26]

Compounding this excessive requirement on the Army has been a corresponding lack of control actually exercised by senior authority.[27] These officials apparently did not know how many computers were involved, what information was being collected by the Army, and indeed who was actually collecting it. It appears that the first glimmer of knowledge of the actual nature of this surveillance by senior civilians in the Department came quite by accident in late 1968. For at least two years afterwards, revelations continued to surprise these officials, despite repeated efforts on their part to learn and to control the actions of their subordinates.[28]

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[26] "So comprehensive were the requirements levied in the civil disturbance information collection plan that any category of information related even remotely to people or organizations active in a community in which the potential for a riot or disorder was present, would fall within their scope." Statement of Assistant Secretary Froehlke, *Hearings*, p. 384.

[27] As of early 1971, rules governing military surveillance still depended on the "discretion" of government officials. See *Hearings*, pp. 385, 435, statements of Assistant Secretary Froehlke.

[28] See, *e.g.*, statement of Assistant Secretary of Defense Froehlke, *Hearings*, p. 427; statements of Army General Counsel Jordan, *Hearings*, pp. 454, 462, 464; testimony of Edward Sohier, *Hearings*, p. 227. The degree to which various officials were aware of the surveillance and their success in controlling it is only partially disclosed by the unclassified materials presently available. On January 12, 1972, the Constitutional Rights Subcommittee was informed by the Defense Department that most of the intelligence responsibilities of the individual services had been reorganized under the direct control of the Secretary of Defense. Letter, Buzhardt to Ervin, January 10, 1972. See *Hearings*, p. 2086.

The evidence available illustrates that the program as actually conducted has been as broad as the directives permit, and if anything, even broader, and has sometimes been conducted in violation of the Army's own regulations.[29] Documents segregated for possible use in this action, and made available to counsel,[30] confirm that the surveillance was indiscriminate as regards the persons investigated, the activities observed, the details of the information collected and stored, and the arbitrary classification of individuals and their views. An examination of the products of this surveillance discloses no conceivable usefulness that they might have had for any authorized military responsibility. Indeed, these materials defy all attempts to imagine any governmental purpose they might have served, whether "military necessity" or otherwise.

* * * * *

It is well-settled that activities of government having an inhibiting effect on the First Amendment will be carefully scrutinized. Those activities which are unauthorized by law, unnecessarily broad in their design, which commit too large a degree of discretion to those who are charged with implementing them, or which in actual operation are overbroad, are defective constitutionally if they infringe upon First Amendment rights. Plaintiffs have alleged each of these deficiencies and have substantial evidence to prove their allegations at trial. It is evident, therefore, that they have adequately presented the Court with necessary ingredients of a challenge under the First Amendment.

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[29]See, *e.g.*, *Hearings*, p. 422, statement of Assistant Secretary of Defense Froehlke; Letter, Buzhardt to Ervin, March 26, 1971, *Hearings*, pp. 1220, 1222.

[30]These include the computer printouts and other Army intelligence materials transferred to the Department of Justice for possible use in this litigation. See *Hearings*, p. 1220.

## CONCLUSION

For the reasons above, and for the reasons submitted by respondents, the Court should affirm the decision below and remand the case for trial on the merits.

Respectfully submitted,

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## APPENDIX

The Hearings on Federal Data Banks, Computers, and the Bill of Rights, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92d Congress, 1st Session (1972), Parts I and II, are submitted separately as an appendix to this brief.